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IN THE

Supreme Court of the United States

Term, 194

No. 846 / 103

ESTATE OF GILLIAT G. SCHROEDER, DECEASED, LOUISA R. SCHROEDER AND HELEN S. CROLL, *Executors*,
Petitioners.

vs.

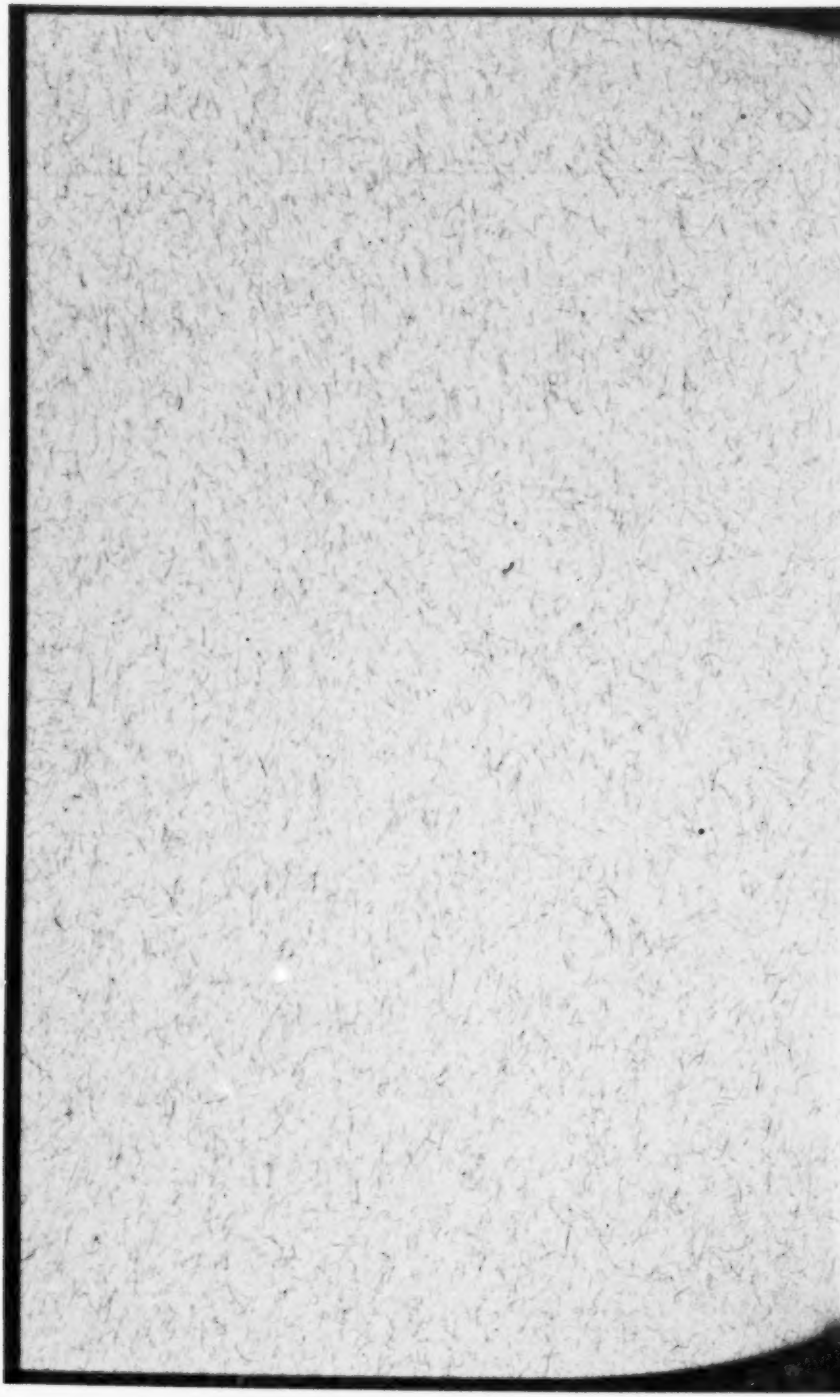
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit and Brief in Support Thereof.

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TABLE OF CONTENTS

Page

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Jurisdiction 2

Summary of the Matter Involved 2

Questions Presented 4

Reason for Granting the Writ of Certiorari 4

Prayer 5

BRIEF IN SUPPORT OF PETITION

The Opinions Below 6

Statement of the Case 6

Argument:

1. The Asserted Power of the Commissioner of Internal Revenue to Reserve to Himself Alone Final Authority to Decide Questions of Law Which May Arise Under the Proposed Treasury Regulation Is Presumptively in Violation of the Doctrine of Separation of Powers and Illegally Encroaches on the Constitutional Functions of the Courts 7

2. The Decedent in This Case Had No Possibility of Reverter or Other Interest (Except His Life Estate) Under New York Law, and the Commissioners Could Not Validly Hold Otherwise 8

3. Reversal of the Decision Below and the Direction of Judgment for Petitioners Would Be Consistent With Precedent in This Court 10

TABLE OF CITATIONS

CASES — *Page*

Commissioner v. Estate of Church, 335 U. S. 632: 2, 3, 4, 5, 7, 8, 10, 11

May v. Heiner, 281 U. S. 238 7

Matter of Dudley, 168 N. Y. Misc. 695 10

Carpenter v. Wabash Railway Co., 309 U. S. 23 10

STATUTES

Judicial Code, Sec. 1254(1) 2

TEXTS

Restatement of the Law of Property, Vol. III, Sec. 254, p. 1284 9

Page on Wills, 1926 Ed., Vol. II, p. 1861 10

PERIODICAL

Promulgation of Intention of Treasury Department to Adopt New Estate Tax Regulation with Regard to Decision in *Commissioner v. Estate of Church*, 335 U. S. 632, Federal Register, Vol. 14, No. 72, p. 1824 (April 15, 1949) 3

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit and Brief in Support Thereof.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Louisa R. Schroeder and Helen S. Croll, Executors of the Estate of Gilliat G. Schroeder, deceased, petition for a writ of certiorari to review a decision of the U. S. Court of Appeals for the Second Circuit reversing a decision of the Tax Court of the United States entered May 26, 1947.

Jurisdiction

Judgment of the Court of Appeals was entered on March 9, 1949. The opinion of the Court of Appeals is reported in 172 F. (2d) 864. The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code, 28 U. S. C. Section 1254 (1).

Summary of the Matter Involved

This is a Federal estate tax case involving the taxability of an irrevocable inter vivos trust established by the decedent, a resident of New York, on January 11, 1928, nearly fifteen years prior to his death on October 3, 1942.

The Commissioner of Internal Revenue unsuccessfully contended in the Tax Court that this inter vivos trust was taxable solely by reason of the alleged existence of a "possibility of reverter" in the decedent. The Tax Court did not pass on the question as to whether decedent actually owned a reverter, but held for the taxpayer because there was no reservation of a reverter by the *express words* of the deed of trust. Thereafter, in seeking reversal of the Tax Court's decision in the Court of Appeals, the Commissioner again urged, as the only ground of taxability, the asserted existence of a "reverter" in the decedent under New York law.

The taxpayers (petitioners herein) have at all times denied the existence of any possibility of reverter in the decedent, and the briefs in this case were submitted to the Court of Appeals on the assumption that the point involved was the existence or non-existence in the decedent of a possibility of reverter.

While the case was pending before the Court of Appeals this Court decided *Commissioner v. Estate of Church,*

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335 U. S. 632, the opinion of the court having been filed on January 17, 1949.

Thereafter on March 9, 1949, the Court of Appeals rendered a *per curiam* opinion in open court reversing the decision of the Tax Court solely "on authority of" the *Church* decision. Accordingly, the point argued in the Tax Court and on brief in the Court of Appeals, i.e., Did the decedent have a "reverter" in the principal of the trust, was left undecided because the court noted in the record of the case that the decedent had retained a life interest in the income of the trust and that this fact alone warranted application of the *Church* decision.

After the time for rehearing, reargument or other application to the Court of Appeals had expired, the Commissioner of Internal Revenue, on April 15, 1949, announced his intention to regard the *Church* case as being entirely inapplicable to the estate of any decedent who died before January 17, 1949, the date on which this Court filed its opinion in the *Church* case (see Federal Register, Vol. 14, Number 72, page 1824, at 1825, paragraph (D), issue of April 15, 1949). This newly announced principle is intended to become a part of the Estate Tax Regulations which, unless later modified, are to provide:

> "In the case of a decedent who died on or before January 17, 1949, the date of the decision of the United States Supreme Court in 'Commissioner v. Estate of Francois L. Church,' 335 U. S. 632, property transferred before 10:30 P.M., eastern standard time, March 3, 1931, shall not be included in the gross estate under this section if the Commissioner, *whose determination shall be conclusive*, shall determine that the decedent's

only right or interest in the property consisted of an estate for his life." (Italics supplied.)

The decedent in this case died prior to January 17, 1949. He had established the trust irrevocably prior to March 3, 1931. But the Commissioner has failed to determine in this case that the decedent's "only right or interest in the [transferred] property" consisted of an estate for life within the meaning of the newly announced Treasury proposal to treat the decision in the *Church* case as having prospective operation only.

Questions Presented

1. Does the Commissioner of Internal Revenue, upon promulgating a general rule of tax exemption, have authority to determine "conclusively," questions of law which decisively govern the decision as to whether or not a particular taxpayer is entitled to the exemption?

2. Did the decedent in this case as a matter of law retain any "right or interest" in the trust estate established by deed dated January 11, 1928, other than a life estate in the income of the trust?

Reason for Granting the Writ of Certiorari

The discretionary power of this Court to grant the writ prayed for is respectfully invoked upon the following grounds:

1. An important question of Federal law is presented by the promulgation of the intended Treasury Regulation, whereby the Commissioner of Internal Revenue assumes the power to determine "conclusively" questions of law arising as a result of his announced intention to regard

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the decision of this Court in *Commissioner v. Estate of Church*, 335 U. S. 632, as inapplicable to the estate of any decedent dying before it was rendered.

Prayer

For the foregoing reasons your petitioners pray that a writ of certiorari may issue out of this Court to the United States Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court on a day to be determined, the full and complete transcript of the record of all the proceedings of such Court of Appeals had in this case, to the end that the case may be reviewed and determined by this Court; that the judgment of the Court of Appeals may be reversed, and that petitioners be granted such other and further relief as may be proper.

Dated: June 6, 1949.

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BRIEF IN SUPPORT OF PETITION

The Opinions Below

The opinion of the Tax Court was an unreported memorandum opinion, but is on file and will be printed by the Clerk with the record below. The opinion of the Court of Appeals is reported in 172 F. (2d) 864.

Statement of the Case

A summary statement of the history of these proceedings is given in the petition, p. 2, above. It is only necessary to add a reference to the provisions of the deed of trust established by the decedent on January 11, 1928.

With respect to the disposition of principal, the deed provided:

> ". . . on the death of the party of the first part [the decedent], to pay, turn over and distribute the principal of said trust estate in equal shares to and among HELEN STEVENS SCHROEDER and GILLIAT G. SCHROEDER, JR., the children of the party of the first part, or if said children or either of them shall not survive the party of the first part, then to pay, turn over and distribute the principal of the said trust estate to such of the said children of the said party of the first part as shall survive him and the issue of such of said children of the party of the first part as may have died leaving issue surviving, such issue to take the share or interest which his, her or their parent would have taken if living."

The decedent was survived by his two children and by three grandchildren.

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Argument

1. THE ASSERTED POWER OF THE COMMISSIONER OF INTERNAL REVENUE TO RESERVE TO HIMSELF ALONE FINAL AUTHORITY TO DECIDE QUESTIONS OF LAW WHICH MAY ARISE UNDER THE PROPOSED TREASURY REGULATION IS PRESUMPTIVELY IN VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS AND ILLEGALLY ENCROACHES ON THE CONSTITUTIONAL FUNCTIONS OF THE COURTS.

In view of the large number of cases which are inevitably affected when this Court overrules a prior tax decision, it is no doubt essential to the orderly administration of the office of the Commissioner of Internal Revenue that he be permitted to apply the new decision prospectively and not retroactively.

In this case, if the Commissioner had merely issued a flat ruling that *May v. Heiner*, 281 U. S. 238, was to be applied to the estates of all decedents who had died prior to the filing of the opinion in the *Church* case, and that the *Church* decision would apply to the estates of all decedents dying after it had been rendered, the result would have been consistent with the desire to avoid retroactive changes, and would have left the courts with full authority to decide all questions of law which might arise either with respect to the rule as it existed while *May v. Heiner* was in effect or as it stood after the *Church* decision was rendered.

Petitioners do not question the authority of the Commissioner to exempt from the *Church* decision the broad class of cases which he has purported to exempt under the proposed Treasury Regulation, but in asserting the absolute, uncontrolled power to determine for himself whether

or not the rule of exemption is or is not to be applied in a particular case, it would appear that he has illegally invaded the province of the courts. Indeed it would seem at least doubtful if Congress itself could, consistently with the Constitution, provide by law that the *Church* decision should have only prospective force but that the Commissioner of Internal Revenue should have the final and unreviewable authority to determine all matters, including questions of law, which might arise in applying the exempting statute to estates of decedents dying before the *Church* decision.

In any case, it is clear that an effort to usurp a judicial function is involved in the Commissioner's assumption of the ultimate power to decide specific issues of law in particular cases arising under the proposed Regulation.

2. THE DECEDENT IN THIS CASE HAD NO POSSIBILITY OF REVERTER OR OTHER INTEREST (EXCEPT HIS LIFE ESTATE) UNDER NEW YORK LAW, AND THE COMMISSIONER COULD NOT VALIDLY HOLD OTHERWISE.

Examination of the deed executed on January 11, 1928, disclosed that the decedent's primary disposition of principal of the trust was as follows:

> "[upon the death of the decedent] to pay, turn over and distribute the principal of the said trust estate in equal shares to and among HELEN STEVENS SCHROEDER and GILLIAT G. SCHROEDER, JR., the children of the party of the first part . . ."

Under this language there can be no question but that the two children acquired vested remainders in the principal immediately upon execution of the deed and if the

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provisions of the deed had ended there, the death of both children during the decedent's lifetime would in no way have affected their absolute ownership of the vested remainders. Their vested future interests in principal would have passed under their wills or in the absence of wills to their next of kin.

Does the subsequent alternative disposition in the deed require that these vested estates be divested except in favor of the issue of a deceased child or the survivor of the two children? The subsequent language is

> "or if said children or either of them shall not survive the party of the first part, then to pay, turn over and distribute the principal of the said trust estate to such of the said children . . . as shall survive him [the decedent] . . . and the issue of such of said children . . . as may have died leaving issue surviving. . . ."

Petitioners contend that the *vested* remainders given at the outset to the two children of the decedent were intended to be divested under the alternative disposition *only in the event the expressly made substitutionary gifts took effect*, i.e., only in the event that *one* of the decedent's two children or their issue survived the decedent; and that if the substitutionary gifts did not take effect *at all* by reason of the failure of any of the decedent's children or their issue to survive him, then the vested remainders given to the two children in the first instance would remain undivested and would have passed to the estates of decedent's two children and not to the decedent.

The construction contended for by the petitioners has been recognized by the American Law Institute in the *Restatement of the Law of Property*, Section 254, and is

stated in *Page* on *Wills*, 1926 Ed., Vol. II, p. 1861, as follows:

> "Vested defeasible remainders are often created by a gift to A but providing that if he should die before a certain time leaving issue, his interest shall pass to such issue. *Such a devise is not defeated by the death of the devisee without issue.*" (Italics supplied.)

This rule of construction has been applied in New York where the decedent in this case resided. See *Matter of Dudley*, 168 N. Y. Misc. 695.

3. REVERSAL OF THE DECISION BELOW AND THE DIRECTION OF JUDGMENT FOR PETITIONERS WOULD BE CONSISTENT WITH PRECEDENT IN THIS COURT.

Although the decision of the Court of Appeals in this case reversed a Tax Court decision in favor of the petitioners and did so on a point never argued in the Tax Court or on brief in the Court of Appeals, the holding of the Court of Appeals was in accordance with the intervening decision in the *Church* case. Accordingly, petitioners do not contend that the decision below was wrong when entered.

But if the subsequently proposed Treasury Regulation, insofar as it purports to deprive the *Church* case of retroactive effect, is to be regarded as ultimately acquiring the force and effect of law, this Court may consistently with precedent apply the law as it exists at the time of review. See *Carpenter v. Wabash Railway Co.*, 309 U. S. 23. Petitioners accordingly submit that as a matter of procedure it would be possible for the Court to hold:

1. Assuming the Commissioner's Regulation is not modified prior to review of this case by the Court, the

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Church case is inapplicable because the decedent, Gilliat G. Schroeder, died before the decision in that case was rendered.

2. The courts have the ultimate authority to determine whether or not the decedent had any "right or interest" in the trust estate other than his interest in the income for life.

3. The decedent had no right or interest in the trust estate except his life estate and therefore the original judgment of the Tax Court in favor of the petitioners must be reinstated.

In the alternative, if this Court were of the opinion that the question of New York law should first be passed upon by the Court of Appeals for the Second Circuit, the case could be remanded with directions to that court to determine whether or not, as a matter of law, decedent actually did have any interest in the trust other than his life estate. It is noted that neither the Tax Court nor the Court of Appeals decided this question, although it was argued by petitioners; and petitioners submit that the question should be judicially determined.

It is respectfully submitted that a writ of certiorari should issue to the Court of Appeals for the Second Circuit as prayed for in the annexed petition.

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